BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Carol Shapiro dated 21 November, 1990, alleging discrimination in employment on the basis of creed.

B E T W E E N :

Ontario Human Rights Commission

- and -

Carol Shapiro

Complainant

- and -

The Regional Municipality of Peel
Michael Garrett, Dr. Peter Cole, Elma Lobo

Respondents

INTERIM DECISION

Adjudicator : Heather M. MacNaughton

Date : February 3, 1997

Board File No: BI-0094-96

Decision No : 97-002-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Anthony Griffin, Counsel
Carol Shapiro, Complainant	)	Paul Henry Shapiro, Counsel
The Regional Municipality of Peel, Michael Garrett, Dr. Peter Cole, Elma Lobo, Respondents	)	Vince Johnston, Counsel

INTERIM DECISION

The Background

The Respondent, the Regional Municipality of Peel ("Peel"), seeks to have Carol Shapiro's complaint dismissed. Peel and the Ontario Human Rights Commission (the "Commission") have reached a settlement, to which Ms. Shapiro is not a party. As a result of the settlement the Commission will call no evidence, make no submissions, and seek no remedy against Peel in the hearing before the Board of Inquiry.

The Issue:

I am asked to find that Ms. Shapiro cannot proceed with her complaint before the Board of Inquiry in the absence of the Commission. Counsel on behalf of Peel argues that because the Commission has carriage of Ms. Shapiro's complaint, a settlement reached between it and the respondent concludes the process before me.

The Arguments

Counsel on behalf of Peel argues that, pursuant to the Ontario *Human Rights Code* R.S.O. 1990 c. H.19 (the "*Code*"), the Commission controls all aspects of a human rights complaint up to, and including, referral of a complaint to the Board. Counsel submits that the Commission performs a number of different roles under the *Code* including: intake of complaints (Section 32(1)), investigation and mediation (Sections 33, 34 and 37), and, ultimately, dismissal of the complaint or referral to the Board of Inquiry (Section 36). Once a panel of the Board of Inquiry has been appointed to inquire into the referred complaint, the Commission has carriage of the complaint at the hearing. Counsel for Peel submits that it would be surprising if the Commission did not continue to control the process at the Board of Inquiry after exercising such control up to that point. They argue that 'carriage' of the complaint is the mechanism by which the Commission retains control over the continuation of the complaint.

Counsel for both the Commission and Ms. Shapiro disagree. They submit that section 39 of the *Code* specifically grants separate party status to the Complainant at the hearing and that, as a party, the Complainant has the right to call evidence, to examine witnesses, and to make arguments. They further submit that if I were to adopt the position of Peel, the Commission would be able to force Complainants to accept otherwise unacceptable settlements. Counsel for Ms. Shapiro did not argue that the Commission should not have reached a settlement independent of the Complainant and hence I am not required to deal with that issue.

A review of the existing case law indicates that the issue before me has not been previously decided by a Board of Inquiry under the current statutory regime. In a number of cases a complainant has proceeded before the Board of Inquiry in the absence of the Commission, where the Commission has withdrawn after reaching a settlement with the respondent. (*Strauss v. Ontario (Liquor Licence Board)* (1995), 22 C.H.R.R. D/169 (Ontario Board of Inquiry, Beckett); *Guthro v. Westinghouse Canada Inc. (No. 2)* (1992), 15 C.H.R.R. D/388 (Ontario Board of Inquiry, Gorsky); and *Barclay v. Royal Canadian Legion, Branch 12* (Unreported, October 11, 1995, Leighton)) It appears from the reasons given in those cases that the issue before me was not argued.

Decision

Section 39(1) of the *Code* requires me to hold a hearing for the specific purpose of determining whether a right of the complainant has been infringed. I can dispose of the matter without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990 c. S.22 as amended (the "S.P.P.A.") if all the parties consent to that disposition. It is clear that Ms Shapiro does not consent. Therefore, unless the position of Peel is accepted, I must hold a hearing.

Counsel for Peel referred me to a number of labour cases in which it has been consistently held that a grievor cannot proceed with a grievance in the absence of its union. Counsel submits that

while these cases are not binding on me, the situation is analogous. I do not agree. Labour statutes have not been accorded the quasi-constitutional and fundamental status awarded the *Code*. (*O'Malley v. Simpson-Sears* [1985] 2 S.C.R. 536, *Insurance Corp. of British Columbia v. Heerspinc* [1982] 2 S.C.R. 145) Further, there is a significant statutory difference in that the *Code* specifically gives the complainant party status. No such provision exists in labour statutes which, by contrast, accord unions exclusive representation rights on behalf of their members.

In my view an interpretation of the *Code,* which would give the Commission authority to force acceptance of a settlement on a complainant, is inconsistent with the fundamental, quasi-constitutional nature of human rights legislation. The Commission can settle with respondents on the basis that a public interest remedy has been achieved. For example, the Commission may wish to settle with an employer who amends a discriminatory policy prospectively to comply with the *Code* if the policy change satisfies the public interest and public education mandate with which the Commission is charged. The settlement may not however provide for damages which are acceptable to the complainant whose personal interests have been affected.

Without specific wording in the *Code*, I am not prepared to find that the complainant in such a situation is unable to pursue her/his right to an individual remedy. To do so would be, in my view, ignore the party status specifically granted by the statute.

Further, the Board of Inquiry has historically recognized the complainant as a separate party. (*Naraine v. Ford Motor Company* (Unreported, Backhouse September 14, 1995) and *Burney v. University of Toronto* (1995), 23 C.H.R.R. D/90)

I am of the view that the independent party status accorded the complainant entails the full rights accorded any party in a proceeding. Those include the right to call evidence, examine and cross-examine witnesses and to make arguments. To decide otherwise in this case would be to force

this complainant to accept a settlement which is clearly not acceptable to her. Had that been the intent of the legislation it could have been achieved by providing that the Commission is the 'prosecutorial' party before the Board of Inquiry.

If granted, the order sought in this case would have grave, far-reaching consequences for the processing of human rights complaints. The Commission would be reluctant to settle, knowing the complainant could not proceed without them and complainants could be unduly pressured into accepting settlements they did not wish to, by the threat that the Commission and the Respondent would settle leaving them no right to continue.

For all of the above reasons the motion brought by Peel is dismissed.

Dated at Toronto this 3rd day of February, 1997:

Heather M. MacNaughton
Board of Inquiry